SUPREME COURT U. S.

IN THE

Supreme Court of the United States

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October Term 1967

No. 990

In the Matter of the Estate of
MARCELLUS LINDSEY JOSLYN, also known as MARCELLUS L. JOSLYN, and as M. L. JOSLYN,
Deceased.

MARCELLUS N. JOSLYN,
Petitioner,

vs.

COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA, at Los Angeles and ROBERT D. MacDONALD, individually and as Executor of the Last Will of MARCELLUS L. JOSLYN, Deceased,
Respondents.

BALDO M. KRISTOVICH, Public Administrator, ILSE, AUDREY POLERI, MARCIA HARRIET JOSLYN SILL, MARY ALICE GURLEY,
Respondents.

MARCELLUS N. JOSLYN,
Petitioner,

vs.

COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA; MERRITT L. JOSLYN, MARY C. PARKER CURRIVAN, RONALD MERRITT JOSLYN, JOY LOUISE MacNULTY, JOYLON DAVID JOSLYN, THEODOE NEWELL JOSLYN, CELIA ALICE PARKER, M. WESLEY PARKER, III, MARCELLUS JOSLYN PARKER, ALICE JOSLYN, WILLIAM DWIGHT JOSLYN, PENNY IRENE JOSLYN, MARCELLUS LeFEVRE JOSLYN MARINA ELAINE JOSLYN, LOIS E. MENDENHALL, MRS. MARY R. SHOFF CAREY, ROBERT F. DOLAN, BALDO M. KRISTOVICH, Public Administrator, ILSE AUDREY POLERI, MARCIA HARRIET JOSLYN SILL, MARY ALICE GURLEY, and ROBERT D. MacDONALD, individually and as Executor of the Last Will of MARCELLUS L. JOSLYN, Deceased,
Real Parties in Interest.

Petition for a Writ of Certiorari Directed to the Court of Appeal, Second Appellate District, State of California.

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Real Parties in Interest.

Petition for a Writ of Certiorari Directed to the Court of Appeal, Second Appellate District, State of California.

To the Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

Comes now Marcellus N. Joslyn and petitions this Honorable Court for a writ of certiorari directed to the Court of Appeal, Second Appellate District of the State of California to review and reverse an order and judgment of that court denying a petition to recall the remittitur from a dismissal of an appeal from a will contest involving a $15,000,000 estate for alleged failure of the petitioners and will contestant to comply with a pretrial order of discovery and thus arbitrarily to approve the faulty will and thus to take property rights away from petitioner in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, the property rights of inheritance of his share of his father's $15,000,000 estate to which he would be entitled to one fourth and rights to his mother's testamentary trust of $2,500,000. The Supreme Court of California on September 7, 1967 denied a hearing from the order of the California Court of Appeal denying recall of the remittitur.

Justice William O. Douglas extended time to file this petition for certiorari to January 6, 1968. California procedure provides for such recall of remittitur (see petition to Recall Remittitur, Points and Authorities).

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 1257-(3), United States Code, and Rules 21, 22 and 23, particularly 23(f) of this Court.

Judgment of the Court of Appeal of the State of California, Second Appellate District, Division 2 refus-

ing to recall the remittitur on the ground contended for by Petitioner that the failure to do so was violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States was rendered on July 27, 1967. [R. page immediately after the grey covered printed petition to recall the remittitur]. Petition for hearing from this denial was duly and regularly filed in the Supreme Court of California. That court denied a hearing September 7, 1967. [R. page following petition for hearing.]

This petition for writ of certiorari is being filed within 90 days of the order denying a hearing of the same, and an extension of time by Hon. Justice William O. Douglas to January 6, 1968.

Statutes and Constitutional Provisions Involved.

The statutes involved are contained in Appendix A, to wit: Sections 370, 374, 380, 385, 1230, 1233 and 1240 of the Probate Code of California, and Sections 2016(a), 2030 and 2034, and 2034(iii) Code of Civil Procedure of California. The Fourteenth Amendment to the United States Constitution.

Opinion Below.

Neither the Court of Appeal nor the Supreme Court published an opinion. There was merely an order denying the motion to augment the record and an order arbitrarily and capriciously dismissing the appeal in the Court of Appeal. The Supreme Court of California denied a hearing without opinion September 7, 1967 from the petition to recall the remittitur.

The Facts.

Your petitioner is the son of Marcellus L. Joslyn, a manufacturer of telephonic equipment, who left an estate on his death valued at $15,000,000 and who, in a will filed for probate in which the document and date appears altered, named a lawyer, who was also his tax adviser, business associate and secretary, as the executor of the $15,000,000 estate and the research of certain residual benefits. By the terms of the said will, this young lawyer, tax adviser, business associate and secretary also became the testamentary trustee of fifteen $1,000,000 trusts of fifteen grandchildren, for which he receives compensation of 3 per cent per trust per annum and is given sole and exclusive discretion and power to operate and run these trusts.

Under the terms of the will of Alice N. Joslyn, the trustee of the Alice Newell Joslyn testamentary trust, who was her husband, had power to appoint a successor trustee by his own will and pursuant to such power he also purportedly appointed Robert D. MacDonald, the young lawyer, as such successor trustee of the Alice Newell Joslyn testamentary trust, which involved being trustee of another $2,500,000 in property with its attendant fees.

The will on its face appears unnatural in that it excludes the children of the decedent from any financial benefits. It also appears altered as to the date of its execution.

Under California law a will drawn by an attorney who is financially benefited presumably is the product of undue influence.

Your petitioner filed a will contest prior to probate. On advice of his then attorney, who later became a fed-

eral appellate judge, petitioner dismissed the will contest prior to probate in order to give ample time as requested by this attorney for preparation of the will contest. California law permits filing of a will contest after probate if the pre-probate will contest was not tried. Later he filed a will contest after probate which was the subject of many attempts—ultimately successful—to knock out the post probate will contest on its merits by means of unanswered requests for discovery under Section 2034(iii) of the Code of Civil Procedure and for alleged failure by petitioner to comply with such requested discovery.

Petitioner had given 5 days of deposition testimony from 9 a.m. to 5 p.m. prior to the admission of the will to probate.

Although the probate practice is governed by the Probate Code and is only governed by Part 2 of the Code of Civil Procedure when not covered by the Probate Code, nevertheless, many attempts were made to obtain late discovery just before trial and a motion was made to dismiss petitioner's will contest on the basis of failure to comply with Section 2034 of the Code of Civil Procedure, and again grant discovery at the late date requested.

At the time of the hearing on the motion, Mr. Joslyn's then attorney, Phill Silver, had an application before the California Court for a protective order authorized by California law and other proceedings which had not been passed upon by the Court. No testimony was taken by the trial court at the hearing on the motion to dismiss petitioner's will contest on October 5, 1966 as to his good faith in his various contests nor as to whether the presumption of undue influence which

covered the lawyer-trustee was overcome by testimony of any kind. Instead, the trial judge arbitrarily and without testimony granted a motion to dismiss the post probate *will* contest.

The notice of motion was to dismiss the *will contest,* not the amended will contest which was filed after demurrer to the will contest. The court nevertheless later granted a motion without further notice or hearing or proceedings to dismiss the $15,000,000 *amended* will contest, the amendment being the result of the trial court having sustained demurrers to the pleadings which was followed by subsequent amendments to conform to the trial court's requirements of amending the pleadings. Nevertheless, the trial judge arbitrarily dismissed the amended will contest and made purported findings without testimony and without a hearing.

The result of such proceeding was to penalize the contestant, the eldest son of the decedent, to the extent of his proportionate share of the $15,000,000 estate and also to act as executor of the will of his deceased mother and to direct and handle the estate of his mother, another $2.500,000 penalty.

Then counsel for the petitioner did not pay the filing fee in time in the Court of Appeal from the order of dismissal, but was later granted relief by the Court of Appeal on April 5, 1967 and under the law would then have had until May 5 to file his opening brief and would not actually be in default until June 4, without any further extensions and providing a card notice had been sent pursuant to the rules of the court.

Petitioner had paid the filing fees twice, but had at no time received notice of the time when the opening brief was due or advised that he might be in default.

There was pending on appeal from an order seeking a protective writ of mandate from the appellate court to prevent the taking of any discovery which had not been acted on when the trial judge nevertheless arbitrarily and capriciously dismissed the will contest.

Thus, penalties have been imposed upon the petitioner herein to the extent of his share of the $15,000,000 from the father's estate and $2,500,000 from his mother's estate by a denial of a right to be heard under the amended will contest and based arbitrarily on alleged failure to comply with Section 2034(3) of the Code of Civil Procedure of California.

The questions involved here are whether a state judge may arbitrarily dismiss an amended will contest without notice or granting a hearing on the merits of the same, thus taking away the property of the petitioner to the extent of more than $3,500,000 and other rights (his fourth), as a penalty, without violating due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and whether the statute (Section 2034 (iii) C.C.P. of California) inherently and as construed and applied in this case, which allows *pro confesso* to take property as a confession of judgment is arbitrary and carpricious and in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and as laid down as early as *Boyd v. United States,* 116 U.S. 616, and again repeated in *Hovey v. Elliott,* 167 U.S. 409.

Three days before the trial was to start on the merits, to-wit: October 5, 1965, pursuant to the notice of trial previously served on the petitioner herein that his trial was to start on October 6, 1965, later post-

poned to October 8, plaintiff, through influential counsel, was able to get the trial judge arbitrarily to dismiss the post probate will contest and thus terminate the litigation without a trial on the merits and solely because of litigation alleged violation of Code of Civil Procedure, Section 2034(3).

Petitioner appealed the decision and the appeal was dismissed and the Supreme Court upheld the dismissal without a hearing. In none of the events has the petitioner had his day in court on the absolutely authorized will contest. Thus, the rules of discovery of Section 2034 of the Code of Civil Procedure, Subsection (3), became a booby trap for petitioner and his then counsel in which the plaintiff, through more influential counsel, was able to confiscate petitioner's property rights to determine, under the will, whether he is entitled to one-fourth of the $15,000,000 estate and, in turn, entitled to become one of the trustees of the testamentary trusts under his mother's estate because of the voiding of the power of appointment under the will.

Petitioner thus challenged the constitutionality of Section 2034(3) of the Code of Civil Procedure of the State of California, inherently and as construed and applied in this case, in a petition to recall the remittitur, which petition is a part of the record in this case. In this petition, the petitioner herein first challenged the constitutionality of the procedure and proceedings under the Fourteenth Amendment to the Constitution of the United States. It is contained in the grey covered document that is a part of the record herein.

On page 22 of the said document, the petitioner denied that there had been a wilful refusal to grant

discovery in any respect whatsoever. Even if there were refusal of discovery, which we deny, the sanctions provided by the California Legislature are constitutionally limited to effectuate its objects, namely, to secure discovery and not to penalize the litigant or to forfeit property to which he is entitled. The right to receive property in an estate is a right which is guaranteed by Article I, Section 1 of the Constitution of the State of California and the Fourteenth Amendment to the Constitution of the United States. (See: Louisell, Modern California Discovery, p. 354; and the limits of discovery in Fifth and Fourteenth Amendments; *Societe Internationale pour Participations Industrielles v. Rogers,* 357 U.S. 310, 2 L. Ed. 2d 1255.)

Your petitioner prays that this court order that the remittitur be recalled because of denial of due process of law guaranteed by the 14th Amendment U.S. Constitution and that his right to have a trial on the merits of the amended will contest be restablished.

The petition to recall the remittitur was denied July 27, 1967 by the Court of Appeals, Second Appellate District, State of California, Division Two. Thereafter, a petition for hearing in the Supreme Court, which petitioner was again heard by the Supreme Court on its claim of the unconstitutionality under the 14th Amendment U.S. Constitution of Section 2034(3), Code of Civil Procedure of California, inherently and as construed and applied in this case, and also as to a false statement having been made to the court by attorneys for the plaintiff that there was no certificate of readiness filed (*Mooney v. Holohan,* 294 U.S. 103) as an additional basis for the recall of the remittitur and said petition for hearing was denied by the Supreme

Court on September 7, 1967. This petition for writ of certiorari is being filed within 90 days of said denial and on extension granted by Justice Wm. O. Douglas to January 6, 1968.

The amended will contest in this case involves determination of valuable rights of the children of whom petitioner is one—the oldest son of decedent and involved the question of undue influence which California presumes exists in the case of an attorney who writes a will in which he benefits, as the evidence in this case shows the executor-attorney would benefit in this case.

On July 22, 1965 attorney Ernest J. Zack, signed and filed a certificate of readiness for trial, a copy of which is contained in the petition to Recall the Remittitur. Under California law and rules of trial, no further discovery was supposed to take place after the certificate of readiness is filed unless special leave of court was obtained, which it was not in this case.

Thereafter, without such leave of court, attorney Zack attempted to conduct further discovery proceedings and was met with the objections by petitioner's then attorney that the further taking of depositions and other proceedings was for the purpose of harassment and that the petitioner was not required to answer any further questions. Petitioner acted on advice of counsel. Petitioner's then attorney filed a petition for a protective order, alleging that a certificate of readiness had been filed by attorney Zack. Attorney Zack in a declaration under penalty of perjury denied that such a certificate was filed and a copy is enclosed as Appendix D to the petition to recall the remittitur, page 13.

The Supreme Court of California, in denying petitioner a hearing, acted with this false denial before it.

Further, the arbitrary dismissal by the court as of October 5, 1965, three days before trial was of the "will contest". Without any further notice or hearing other proceeding, on the amended will contest, however, the judge dismissed what was really an amended will contest, the amendment having been filed after a demurrer had been sustained to the will contest with leave to amend. Nevertheless, the trial court, without the taking of any testimony as to good faith on the part of petitioner or any other proceedings, then arbitrarily and capriciously and in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States dismissed the *amended* will contest and deprived petitioner of a trial *on its merits*. Unless this Court reverses the orders and judgments below, petitioner will be deprived of his day in court on the right given by California law to contest the validity of his father's purported last will, distributing nothing but furniture and bric-a-brac of little value to the children—the natural objects of his bounty, and a $15,000,000 estate to others.

When the case got to the Court of Appeal, then counsel for the petitioner herein (the appellant there) relied on his then attorney, to whom he had paid a fee of $1000 in advance (R. 4) with an understanding that he would timely get up and file an opening brief on appeal, but petitioner was unaware that a hearing was to be held to dismiss his appeal because of his asserted neglect of his then attorney, Mr. Bonaparte, the result of which would deprive your petitioner of his day in court.

Unless this Court recalls the remittitur and reverses the judgment below petitioner will be barred forever on the very important amended will contest involving himself and his brothers and sister to the extent of an estate of $15,000,000 of his father and a $2,500,000 of his mother. Your petition was on the record in person (*in propria persona*) at the time of the motion to dismiss the appeal in place of his former attorney and was entitled to statutory notice and a hearing on the court's intention to substitute the name of the former attorney into the case and hear the motion to dismiss the appeal in the absence of your petitioner, who was on the record *in propria persona* and without a direct notice to him. This deprived him of notice and an opportunity to be heard, the very first essential of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. (See: *Societe Internationale pour Participations Industrielles v. Rogers,* 357 U.S. 197, 211, 2 L. Ed. 2d 1255.)

The appellate court after arbitrarily substituting in the former attorney did vacate the default of the attorney but did not even wait until the time had expired for filing the opening brief but dismissed the appeal on the summary motion of influential counsel for the respondent.

Even in *United States v. Sorrento,* 175 F. 2d 721, the court said failing to allow the petitioner to proceed on his appeal penalized the defendant here for the omissions of his former attorney and visited the sins of his attorney upon the petitioner. This, we urge, violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Hovey v. Elliott, 167 U.S. 409.

Questions Presented by This Writ.

1. Whether the petitioner has been denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States where his post probate amended will contest, authorized by the laws of the State of California (Section 380 Probate Code of California), has been stricken three days prior to trial because of alleged failure to answer questions at a deposition hearing subsequent to a certificate of readiness being filed and that he failed to serve and file answers to interrogatories requested after the certificate of readiness was filed by defendant and under the discovery procedure of Sections 2030-2034(3) of the Code of Civil Procedure of the State of California, and while an appeal was pending from the denial of a protective order.

2. Whether a statute of a state, which authorizes the striking of a party's pleadings and denial of a trial on the merits of his claim for his share of a $15,000,-000 estate to which he would be entitled if he proved the will invalid, is unconstitutional and void under the Fourteenth Amendment to the United States Constitution where it authorizes summary proceedings of striking a complaint for alleged failure to comply with discovery statutes of the state, to-wit: Section 2034 (3) of the Code of Civil Procedure of the State of California.

3. Whether a state may forfeit and deprive a person of his property or his property rights arbitrarily and capriciously and without a hearing on the merits for alleged failure, if it occurred, to comply with discovery proceedings and thus strike the plaintiff's complaint attacking the validity of his aged father's will for presumptive undue influence, age and informities

and other reasons and deny him a trial on the merits of his claims of the will's invalidity before a jury authorized by law of a state without violating due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

4. Whether a Section 2034(3) of the Code of Civil Procedure of the State of California, inherently and as construed and applied in this case, is violative of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and does it permit the taking of property arbitrarily and capriciously and without a hearing on the merits in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

5. Whether the arbitrary denial of an amended will contest, on its merits before a jury, provided for by the laws of a state, is a denial of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and whether a state, or a judge, thereof may dismiss such a post probate amended will contest arbitrarily and capriciously without a hearing on the merits of the post probate amended will contest and thus deprive a petitioner, the eldest son and other children, the natural object of the bounty of a decedent, of his and their share of a $15,000,000 estate of his father and the right to the appointment as trustee of the testamentary trust in the $2,500,000 estate of his mother.

6. Whether a dismissal of an *amended* will contest, based solely upon a dismissal of a *will* contest, which

will contest was demurred to and *amended* in a subsequently authorized pleading, was a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States where there was no further hearing on the amended will contest and no notice or opportunity to petitioner or his attorney to be present at the proceeding dismissing the amended will contest, whether such proceeding is in violation of the law laid down in *Cole v. Arkansas,* 333 U.S. 196, 92 L. Ed. 644.

7. Whether a false statement to a State Supreme Court that a certificate of readiness has not been filed and upon which that court acts in denying a hearing so fatally infects the fairness and decision of that hearing as to require this Court to reverse the judgment and order below and to remand the case for further consideration upon that basis alone. (*Mooney v. Holohan,* 294 U.S. 103, 79 L. Ed. 791.)

8. Whether a will has been truly and regularly admitted to probate where no foundation was laid for the testimony of the witnesses to the will and where the statutory presumption of undue influence and fraud on the part of the writer of the will, an attorney who benefits from it, has been overcome and whether the hearing at the time that the will was later admitted, to-wit: April 29, 1964, was conducted without notice or hearing on its then admission and whether the procedure therein without notice and a hearing at that time violated due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Reasons for Granting the Writ.

This is another one of the cases in which the courts under the new "discovery" procedure which have invaded our courts have been acting arbitrarily and capriciously like Russian Tyrants and Ho Chi Minh in denying a hearing to a litigant on the merits, thus denying statutory lights to contest a will before a jury, and to have a jury determine the property rights of the children of a decedent.

The respondents just will not come to the conference table of justice before a jury to determine the validity of petitioner's aged father's will in a trial on the merits. They have used the booby trap of "discovery" proceedings and have so far avoided trial on the merits. A hearing by this court will set justice right.

Petitioner herein is the eldest son of the decedent and one of those who would be entitled to his bounty if the will was declared null and void as the result of undue influence, improper admission or many other reasons. Nevertheless, petitioner was denied his day in court for obeying his then attorney and declining to submit again to deposition hearing and interrogatories after he had already granted five days or deposition or hearing and interrogatories in the pre-probate proceeding involving the identical subject matter and involving the identical issues.

This Court should grant a hearing to hold that these discovery statutes cannot be used as booby traps for litigants, that influential counsel cannot persuade judges who are persuaded by their standing to dismiss arbitrarily and thus deprive a litigant of his property rights which are inherent in the properties involved in a will and thus to deny a litigant his day in court.

This Court now has the opportunity in this case to lay down the law that the purpose of "discovery" may be to aid in speeding litigation but is not a means or a tool or device of taking away property or property rights arbitrarily and capriciously; that such procedure violates due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

This Court has, as early as *Boyd v. United States,* 116 U.S. 616, held that a statute which provides for arbitrary confiscation of property is a violation of due process of law under the Fifth Amendment to the Constitution of the United States. The same provisions have been upheld by this Court in *Hovey v. Elliott,* 167 U.S. 409, 42 L. Ed. 215. Again, this Court has commented extensively on the fact that such proceedings may be a violation of due process of law under the Fifth and Fourteenth Amendments. (*Societe Internationale pour Participations Industrielles v. Rogers,* 357 U.S. 197, 2 L. Ed. 2d 1255.

Mr. Justice Black in *Beaufort Concrete Co. v. Atlantic States Construction Co.,* 384 U.S. 1004, 16 L. Ed. 2d 1008 (June 20, 1966), in a lengthy dissenting opinion, pointed out that there was a growing number of cases in which the Federal Rules of Civil Procedure had been used to prevent the fair and just determination of a lawsuit on the merits. (16 L. Ed. 2d 1019.)

The same situation now exists among the states and in this case. It is time that this Court laid down its proper rule of law guiding the various states of the county that such a procedure is, in fact, unconstitutional and in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States; that to deny one who has, in effect, a

property right in the subject matter of the litigation cannot be denied his day in Court by the trick and device of his purported failure to respond to discovery in the form that the other party seeks to have it. This case squarely raises the question that discovery was granted at great length in the early stages of the proceedings; that discovery was sought after a certificate of readiness had been filed by defense counsel, who would benefit from the arbitrary dismissal of the amended will contest and a failure to hear it on the merits. This proceeding, has been upheld throughout all of the courts of the State of California, although its right to do so has been challenged under the due process clause of the Fourteenth Amendment to the Constitution of the United States under our petition to recall the remittitur in the Court of Appeal of the State of California, Second Appellate District, Division Two, in the Supreme Court of California, and in the Supreme Court of the State of California, which denied a hearing of the same.

The petitioner was represented by counsel at the last hearing at which he attended and answered some of the questions but declined to answer others on the ground of harassment (he having given five days of deposition testimony earlier), now is faced with dismissal of his amended will contest involving the validity of his aged father's will written by an attorney employed by his father and presumptively under California law the result of undue influence wherein the attorney benefits widely from the contents of the will.

We ask this Court also to re-examine and reverse its holding in *Link v. Wabash Railroad Co.*, 370 U.S. 626, 8 L. Ed. 2d 734, where it, in effect, held the sin of the

lawyer fell upon the client in a dismissal of a diversity negligence action under circumstances there presented where the error was based upon the error of the attorney and not of the client.

Like the expression of Judge Schnackenberg in his dissent to the opinion of the majority for the Seventh Circuit upholding the dismissal in *Link v. Wabach,* when he said

> "The order now affirmed has inflicted a serious injury upon an injured man and his family who are innocent of any wrongdoing. Plaintiff's cause of action . . . was his property. It has been destroyed. The District Court to punish a lawyer has confiscated another's property without process of law which offends the Constitution. . . . Because it was neither necessary or proper to visit the sin of the lawyer upon his client I would reverse." (291 F. 2d 542, 548).

Here, too, the orders of the court below dismissing the post probate will contest (and denying prohibition and mandate) have inflicted a serious injury upon the petitioner, Marcellus N. Joslyn. His cause of action was his property. It has been destroyed. The California courts, who have punished what was claimed to be a failure of discovery under the statute, have now confiscated his property without due process of law, which offends the due process clause of the Constitution of the United States. We contend that state does not have such a constitutional authority. Under the 14th Amendment U.S. Constitution it is not proper, constitutional or necessary to visit the advice, if wrongful, and the sins of the lawyer upon his client nor to

arbitrarily and capriciously take away a valid cause of action of a post-probate amended will contest.

The order of Superior Court Judge Wright in dismissing the post probate amended will contest was not based upon any testimony taken at the time of the dismissal. No testimony was taken regarding the good faith of the petitioner nor were any other sanctions attempted to be imposed such as contempt and to give him a further opportunity to purge himself of that contempt. The dismissal was arbitrarily granted on the motion of the attorneys who moved to dismiss the "will contest" but later the judge entered an order with purported findings of fact and conclusions of law not based upon any testimony upon the amended will contest, without any notice or hearing of the same and in violation of the requirements of Section 1200 of the California Probate Code requiring notice thereof.[1] The whole proceeding was an arbitrary and capricious action in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

This Court has, in the last few years, had many occasions to determine the great shift in the practice of law and whether so-called discovery under the new rules of federal procedure as well as under state procedure constitute a booby trap for lawyers and their clients and by means of alleged unanswered discovery to strike pleadings and deprive litigants of their day in court, and a trial by a jury of peers on the merits.

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[1]Since that time an intermediate appellate court in another Joslyn case has held the notice provision of Section 1200 of the California Probate Code are mandatory. *Joslyn v. Security First National Bank.* (Unpublished opinion Division 5, Second Appellate District.)

In this respect, Mr. Justice Black said in *Beaufort Concrete Co. v. Atlantic States Construction Co.,* 384 U.S. 1004, 16 L. Ed. 2d 1018, 86 S. Ct. 1908, a federal case, as follows:

> "I would grant certiorari in this case. This is another in a growing number of cases in which the Federal Rules of Civil Procedure have been used to prevent the fair and just determination of a lawsuit on the merits. See, e.g., Lord v. Helmandollar, 348 F.2d 780, cert denied, 383 US 928, 15 L ed 2d 847, 86 S Ct 929, Black, J., dissenting; Riess v. Murchison, cert denied, 383 US 946, 16 L ed 2d 209, 86 S Ct 1196, Black, J., dissenting; Link v. Wabash R. Co., 370 US 626, 8 L ed 2d 734, 82 S Ct 1336, Black, J., joined by The Chief Justice, dissenting. In this case I think the summary judgment entered against petitioner by the District Court and affirmed by the Court of Appeals should be reversed and the case remanded to the District Court so that petitioner can have his day in court. The facts in summary are these. Petitioner supplied respondent with concrete to built some docks and warehouses near Savannah, Georgia. When respondent did not pay for all the concrete supplied, petitioner brought this suit to recover the balance, about $90,000. Respondent moved for summary judgment supporting its motion with several affidavits stating that a large portion of petitioner's concrete was defective. On the day set for hearing petitioner filed three affidavits with the court which asserted that the concrete furnished was not defective and that if it was it became so because respondent's agent had

ordered it to be watered down. The District Court, however, refused to consider petitioner's affidavits on the ground that they had not been served 'prior to the day of hearing' as provided by Rule 56(c) of the Federal Rules, and on the basis of the pleadings and respondent's affidavits alone, the court entered summary judgment for respondent. The Court of Appeals affirmed stating that under the Federal Rules the trial court had broad discretionary power either to accept or reject petitioner's untimely affidavits but that the court did not abuse its discretion in rejecting the affidavits. The Court of Appeals went on to state that 'Without the excluded affidavits, little is left to the plaintiff's case—nothing in fact, but the bare allegation in the complaint that [plaintiff] furnished adequate concrete for which it was not fully paid.' Thus for the delay of a few hours—less than one day—in serving affidavits on respondent's counsel, petitioner was deprived of all opportunity to have the court consider its affidavit evidence, which if true, would have entitled it to collect the $90,000 balance for the concrete supplied.

I find it entirely at odds with a fair system of trying lawsuits to throw out a litigant's case because his lawyer for negligence or some other reason fails by less than 24 hours to satisfy one of many procedural time limits. From the beginning to the end of a lawsuit a lawyer must meet a host of time limits for filing papers. Surely a judge should not have discretion to enter final judgment at will every time a slight lapse occurs which may delay for half a day or so the service of one of a

multitude of papers that must be served during the trial and appeal of a law suit.

The summary judgment entered below indicates, in my opinion, a failure to appreciate that 'The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion.' Surowitz v Hilton Hotels Corp., 383 US 363, 373, 15 L ed 2d 807, 814, 86 S Ct 845. If the Federal Rules, as the Court of Appeals holds, repose in the district courts discretion to deprive parties of a full trial on their claims in circumstances like these, then it indicates to me that these rules exalt strict obedience to formality and 'paper work' high above the fair and just trial of lawsuits. Nevertheless, the Federal Rules have been administered this way time and again. As I pointed out in my dissent to the new Federal Rules recently adopted:

Cases coming before the federal courts over the years now filling nearly 40 volumes of Federal Rules Decisions show an accumulation of grievances by lawyers and litigants about the way many trial judges exercise their almost unlimited discretionary powers to use pretrial procedures to dismiss cases without trials. In fact, many of these cases indicate a belief among many judges and legal commentators that the cause of justice is best served in the long run not by trials on the merits but by summary dismissals based on out of court affidavits, pretrial depositions, and other pretrial techniques. 384 US 1034, 15 L 2d 2d lxxvi.

'The filing of court papers on time is, of course, important in our court system. But lawsuits are

not conducted to reward the litigant whose lawyer is most diligent or to punish the litigant whose lawyer is careless. Procedural paper requirements should never stand as a series of dangerous hazards to the achievements of justice through a fair trial on the merits.'"

Earlier, Mr. Justice Black had urged this Court to heed to the language of *Hovey v. Elliott,* 167 U.S. 409, which is quoted herein, also *Surowitz v. Hilton Hotel Corporation,* 383 U.S. 363, 15 L. Ed. 2d 807.

In *Hovey v. Elliott,* 167 U.S. 409, this Court said:

"The demonstration of the unsoundness of the contention that courts of equity have claimed and exercised the power to suppress an answer and thereupon render a decree *pro confesso,* which results from the foregoing review of the authorities, is strengthened by the reflection that if such power obtained, then the ancient common law doctrine of 'outlawry,' and that of the continental systems as to 'civil death', would be a part of the chancery law, a theory which could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen.

'It being therefore clear that the supreme court of the District of Columbia did not possess the power to disregard an answer which was in all respects sufficient and had been regularly filed, and to ignore the proof taken in its support, the only question remaining is whether a judgment based upon the exercise of such an assumed power is void for want of jurisdiction, and may therefore be collaterally attacked. It cannot be doubted that where a judgment is rendered without the issuance

> and service of summons against a party who did not enter an appearance, the court rendering it is without jurisdiction ot do so, and it can be assailed as void whenever presented as a muniment of right against another. Looking at the substance and not the form of the decree in the case of *Hovey v. McDonald,* 109 U. S. 150 [27:888], upon which the rights of the plaintiff in error depend, it is plain that the judgment was substantially one without a hearing, for of what efficacy or avail was the summons to appear when the court which issued the summons rendered its judgment upon the theory that the summons was inefficacious, and that the defendant had no right either to appear to be heard in his defense? As said by this court in *Postal Teleg. Cable Co. v. Adams,* 155 U. S. 689 [39:312, 5 Inters. Com. Rep. 1]: 'The substance, and not the shadow, determines the validity of the exercise of the power.'"

As early as *Boyd v. United States,* 116 U.S. 616, this Court has ruled against arbitrary judgments by which property could be taken *pro confesso* and without due process of law. That decision has been the landmark case for all cases since that time. There has been a great shift of procedure in connection with attempting to eliminate cases by summary judgments and by taking default or striking pleadings and on the basis of lack of discovery. These proceedings, we respectfully submit, pervert instead of advance justice and increase the necessity of litigants going to higher courts and filling the higher courts with plenty of appeals in an endeavor to protect themselves and to get rights they have been arbitrarily and carpriciously denied.

The effect of this Court's denial of a hearing would be to deprive the natural children of the bounty of the decedent and of their rightful share of the property he left behind. It would validate a will which on its face appears to have an altered date and which was written by an attorney whom the laws of the State of California say makes the document presumptively the result of undue influence.

It is therefore important that this Court grant a hearing herein and set at rest for all of the states of the country the limit to which this type of sanctions in respect to discovery can go and to protect litigants on the basic rights of American justice to have a trial on the merits and before juries.

In *Surowitz v. Hilton Hotel Corporation,* 383 U.S. 363, at 373, 15 L. Ed. 2d 808, at 814, the Court said:

> "If the rules of procedure work as they should in an honest and fair judicial system they not only permit but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits."

It refers to Rule 23 of the Federal Rules of Civil Procedure but its language is comparable here, that this rule, like the other civil rules, was written to further, not defeat, the ends of justice. A serious fraud is charged here. As in that case, petitioner here should have been permitted to prove his charges of undue influence and other charges made in his post probate amended will contest which were prepared by an able probate lawyer and verified under oath and should not have been dismissed just three days before the trial was ready to start on its merits and thus to deprive not only

a trial on its merits but a jury trial which the law requires in will contests in California.

This Court has spoken of the denial of rights to poor litigants who cannot afford depositions and discovery as compared with those who can. However, there is another class of litigants who are able to secure able and influential counsel in the case. Thus, victory goes to the influential, not to the just. It is like trial by battle in olden days. Although this is a country of laws, it is administered by men and men are naturally subject to influences of friendship and associations that may well turn the tide and aid in victory in a lawsuit where the decision as here, is arbitrary and capricious. It thus secures results without a trial on the merits and without a trial before a jury, as authorized and required by law to be had, and as the one means of the protection of all citizens. No better means than the jury system, has been evolved in dealing with equal justice. In this particular case, the respondent's counsel of record at the time of the dismissal was a very able lawyer who secured the dismissal and who shortly thereafter became a Superior Court judge in Los Angeles County. Another member of the firm of these very able and influential lawyers was the son of a Supreme Court justice of California who now is also a Superior Court judge. Thus, this firm has had much more than money could achieve. It has had personal and highly successful influence in achieving its objecting and in securing a dismissal of the amended will contest of this out of state client. We pray for recall of the remittitur by order of this court [2nd Civil No. 31472] and for remand of the case for trial on the merits.

Our attack here on the judgment of dismissal is a direct attack on the judgment and proceedings below. A judgment obtained in violation of due process of law is a nullity and void. *In re Rothrock,* 14 Cal. 2d 34; *Chambers v. Florida,* 309 U.S. 227; *Mooney v. Holohan,* 294 U.S. 103. In a separate proceeding we made a collateral attack on this judgment by writ of prohibition and mandate and any other appropriate remedy. This was also denied and a petition for writ of certiorari is being filed separately with this court this day.

We ask for our day in court before a jury on the merits of the amended will contest. We ask this Court to hold that Section 2034(3) of the Code of Civil Procedure of California, inherently and as construed and applied in this case, is in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States in respect to the facts of this case and that the case be remanded to the state courts for trial before a jury on the merits of the amended will contest.

Respectfully submitted,

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